BRABAKARAN v. PUBLIC PROSECUTOR

[F.C. (Ong Ag.C.J. (Malaya), Ismail Khan and McIntyre JJ.) September 17, 1965]

[Ipoh — Federal Court Criminal Appeal No. 40 of 1965]

Penal Code, s. 376 — Rape — Girl below statutory age of consent — Corroboration — Sentence.

The appellant was found guilty of rape of his sister-in-law, a girl under the age of 14 years and sentenced to three years' imprisonment. He appealed.

Held: on the facts the appellant was rightly convicted but as in this case no violence was resorted to by the appellant to overcome resistance and therefore he would have not committed any offence if the girl had been a little older, the sentence of three years was excessive and should be reduced to 18 months' imprisonment.

FEDERAL COURT.

V. Jeyaratnam for the appellant.

Syed Hassan Aljeffri (Deputy Public Prosecutor) for the respondent.

Ong Ag.C.J. (Malaya): In this case the appellant was convicted of rape of his sister-in-law, a girl under the age of 14 years, and sentenced to three years' imprisonment. Whatever difficulties might have presented themselves at the commencement of the trial were resolved by the learned trial judge, who amended the charge from a date in December, 1963, to a date in May, 1964. In a carefully considered judgment, he had given the reasons why he was satisfied with the evidence of the girl, and he also expressly referred to the need to seek corroboration, which he in fact found.

The girl in question, being under the age of 14, the statutory age of consent in this type of cases, it is clear beyond question that, whoever had intercourse with her, had committed the offence of rape in contravention of section 376 of the Penal Code. Therefore, as the learned trial judge himself put it, what remained for him to decide was only the question whether or not it was the appellant who had committed the acts of intercourse alleged to have taken place. For the purpose of this case, we take the same view as the learned trial judge that it is unnecessary to decide to what extent the girl's consent to the act of intercourse was obtained by the influence of her elder sister. He was satisfied and found as a fact that in December, 1963, as well as in May, 1964, the appellant had intercourse with the girl. We also have arrived at the same conclusion of fact.

Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally well be afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words. We are of opinion that if, during the period of her elder sister's confinement, it was necessary for the girl to remain in her sister's house in order to help look after her sister's children, when the appellant's mother had to go to hospital again and the girl's services were again called for, it was more than probable that what she said was true and that she, in fact, went to assist her sister's family during the absence of the appellant's mother in hospital from April to May. It has not been suggested that this girl was in any way promiscuous; it was not suggested that she had any male friends, and it is equally clear that whatever might have been her state of mind towards the first act in December, she was more than a willing party in all the subsequent acts of intercourse with the appellant. We do not consider it necessary for the prosecution to indulge in a process of elimination when there was no suggestion that anybody else even remotely connected could have had intercourse with this girl. For the reasons above stated, we are entirely satisfied that the learned trial judge was right in convicting the appellant and his appeal on conviction is accordingly dismissed.

As regards sentence, in the first place, there is a very wide gulf between this case where, if the girl had been a little older, the accused would not have committed any offence and the other types of rape where violence was resorted to to overcome resistance. In the second place, the girl is unlikely to suffer any psychological after-effects. In the third place, as regards damage to her future prospects of marriage, we do not think there are any serious impediments to such prospects, were she to move to another locality with her family. We accordingly think that the term of three years' imprisonment was on the excessive side and substitute for it a sentence of 18 months' imprisonment.

Order accordingly.

Solicitors: *Cheang Lee & Ong.*

OTHMAN BIN AHMAD v. SINGAPORE TRACTION CO. LTD.

[F.C. (Tan Ah Tah Ag.C.J., Buttrose and Chua JJ. September 22, 1965]

[Singapore — Federal Court Civil Appeal No. 38 of 1965]

Negligence — Personal injuries — Quantum of damages — Damages for pain and suffering and loss of amenities — Loss of future earnings.

Damages — Leg — 1" shortening — Multiple injuries.

This was an appeal by the plaintiff against the award of damages (noted at [1965] 1 M.L.J. xxvi) made in an action brought by the plaintiff against the defendants for damages for personal injuries suffered by the plaintiff and caused by the negligence of the defendant's servant in driving a motor bus. The plaintiff suffered severe injuries to his left leg and these have left him with a deformed foot and short leg. Moreover the ankle and other joints in the foot were affected and showed

signs of osteo-arthritis which would on the medical evidence get worse with time. The trial judge awarded $10,000 for pain and suffering and loss of amenities and $5000 for loss of future earnings.

Held: (1) the award of $10,000 for pain and suffering and loss of amenities was too low and was so much out of line with the discernable trend or pattern of awards in reasonably comparable cases that it must be regarded as having been a wholly erroneous estimate; and that it should be increased to $20,000;

(2) in the circumstances of the case the award of $5,000 for loss of earnings was too low and should be increased to $10,000.

Cases referred to:—

(1) *Bird* v. *Cocking & Sons Ltd.* [1951] 2 T.L.R. 1260.

(2) *Rushton* v. *National Coal Board* [1953] 1 Q.B. 495.

(3) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd* [1964] M.L.J. 463, P.C.

FEDERAL COURT.

H. E. Cashin for the appellant.

M. Coomaraswamy for the respondents.

Chua J.: This is an appeal by the plaintiff against the award of damages made by Ambrose J. in an action brought by the plaintiff against the defendants for damages for personal injuries suffered by the plaintiff and caused by the negligence of the defendants' servant in driving a motor bus on the 23rd September, 1963. Liability was not contested by the defendants, damages being the only issue before the learned judge.

The plaintiff sustained severe injuries to his left leg and foot and these have left him with a deformed and short leg. Moreover, the ankle and other joints in the foot are affected and already show signs of osteo-arthritis which will get worse with time.

The plaintiff was treated in hospital until the 20th November, 1963. During the period that he was in hospital an initial operation was performed to suture the wounds and set the fractures. Ten further operations were carried out as the lacerations over the left foot and left ankle broke down and extensive sloughing occurred and these had to be excised and skin grafting procedures carried out.

The learned judge had before him a report of Mr. V. K. Pillai, the Acting Head of the Department of Orthopaedic Surgery, General Hospital, Singapore, who examined the plaintiff on the 4th May, 1964. Mr. Pillai found:—

(1) that the plaintiff walked with a marked limp and was not able to run;

(2) that squatting was difficult;

(3) that the fractures had united but there was about ¾" to 1" of shortening in the left leg, 1½" of wasting in the left calf and 1¾" of wasting in the left thigh;

(4) that the left hip and knee were normal;

(5) that at the left ankle there was a mild equinus deformity and a slight cavus deformity in the foot;

(6) that there was marked scarring over the front of the ankle and foot;

(7) that movements at the ankle were painful and limited;

(8) that movements at the joints in the foot were markedly restricted and painful; and

(9) that there was about 80% loss in movements in these joints.

Mr. Pillai placed the plaintiff's permanent disability at about 35% to 40%.

Mr. Pillai examined the plaintiff again on the 5th April, 1965. He testified that the plaintiff has to wear a shoe and that the pain could be relieved by an operation.

It is not disputed before us that the equinus deformity of the plaintiff's foot is worse than a dropped foot and that the present condition of the plaintiff's leg is worse than some amputees as far as mobility and pain are concerned.

The learned judge came to the conclusion that $10,000 would be a fair sum to award as compensation for pain and suffering and loss of amenities.

The evidence as to the plaintiff's employment showed that at the date of the accident he was a second water jointer employed in the Water Department of the Public Utilities Board and that he is still employed in that capacity. The pay of a second jointer is $4.95 per day and after five years he gets $5 per day and after another five years he gets $5.05 per day, which is his highest pay. If the plaintiff is promoted to first water jointer he would start with $5.75 per day and he would get an increase of 25 cents after five years and the ceiling is $6.25.

The Superintendent of Waste Detection in the Water Department of the Public Utilities Board testified that the plaintiff was now doing lighter work, although he was certified fit to do normal work, that his work was quite satisfactory and that his chance for promotion was fair. He further testified that the plaintiff was kept in employment because he was an old employee and his disability was only partial.

The learned judge took the view that $5,000 would be a reasonable sum to award for the loss of future earnings.

It was submitted on behalf of the plaintiff that the award of $10,000 for pain and suffering and loss of amenities was so inordinately low that this court ought to increase it and, furthermore, that the amount did not follow the trend of awards given by the courts for similar injuries.

On behalf of the defendants it was submitted that the plaintiff should go for the further operation so that the pain in the left ankle and foot could be relieved. The plaintiff on the

other hand refused to undergo the further operation. Both counsel said that the learned judge must have thought that the plaintiff should go for the further operation. It was submitted on behalf of the defendants that this court should not interfere with the view of the learned judge. The learned judge, however, has not expressed his view on this matter. It was further submitted on behalf of the defendants that it was the duty of the plaintiff to mitigate damages but it seems to me the relevant question is whether the plaintiff was unreasonable in refusing to submit himself to the further operation. In my view there is no evidence upon which it could be found that the plaintiff's refusal was unreasonable.

It is of course impossible to standardise damages for personal injuries but the assessments which the courts have made over the years form some guide to the kind of figure which is appropriate and which the appellate court will follow in the light of the special facts of each particular case. (*Bird* v. *Cocking & Sons Ltd.*,[1] *Rushton* v. *National Coal Board*[2]). The law on this matter has been clearly laid down by the Privy Council in the Malayan case of *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.*[3] In that case Lord Morris (delivering the judgment of the Board) said:

"In appeals comparable in nature to the present one it must be recognised, as was said by Lord Somervell in *Lim Joo Chiang* v. *Lim Siew Choo and another* [1955] M.L.J. 201, that the burden on an appellant who invites interference with a figure that has commended itself to two courts is indeed a heavy one. In deciding this appeal their Lordships think that three considerations may be had in mind: (1) That the law as to the factors which must be weighed and taken into account in assessing damages is in general the same as the law in England. (2) That the principles governing and defining the approach of an appellate court that is invited to hold that damages should be increased or reduced are the same as those of the law in England. (3) That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social economic and industrial conditions exist.

It need hardly be emphasised that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardised or that there should be any attempt at rigid classification. It is but to recognise that since in a court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion. As far as possible it is desirable that two litigants whose claims correspond should receive similar treatment just as it is desirable that they should both receive fair treatment. Those whom they sue are no less entitled."

Before the learned judge and before us a number of comparable cases were referred to by both counsel. I do not think any useful purpose would be served by referring to these cases nor to record the various individual awards. I have considered these cases with that full measure of caution to which their Lordships in the *Jag Singh's* case have referred and I have come to the conclusion that the award of $10,000 is too low and "was so much out of line with a discernable trend or pattern of awards in reasonably comparable cases that it must be regarded as having been a wholly erroneous estimate." I consider that for pain and suffering and loss of amenities the plaintiff should have been awarded $20,000.

I now turn to the question of the plaintiff's loss of future earnings for which the learned judge awarded the sum of $5,000. Counsel for the plaintiff attacked the award on the grounds that:

"(1) the learned judge failed to take into account that when the plaintiff was retired at the age of 55 from the City Council he would be unable to or at least a serious disadvantage in earning his living; and

(2) the amount awarded was too low in the circumstances."

Counsel for the defendants said to us that the plaintiff's retiring age was 60 years. No evidence, however, was adduced before the learned judge as to the age of retirement but plaintiff's counsel in his address to the learned judge said that his client had to retire at the age of 55 and no objection was taken by defendant's counsel. In that state of confusion it must be taken that the age of retirement is 55 years.

Osteo-arthritis seems to me to be a very important factor in this case and must be taken into consideration in assessing the future loss of earnings of the plaintiff. The plaintiff is already suffering from osteo-arthritis which will get worse with time. There is a strong possibility that many years before the plaintiff reaches the retiring age (he is now only 28 years old) the pain in his left ankle and foot could be so crippling that he might not be able to work at all. The learned judge did not appear to have given sufficient weight to this very important factor.

In my view after weighing all the circumstances the sum of $5,000 awarded by the learned judge was too low and I feel that the sum of $10,000 should have been awarded.

I would for the reasons previously stated allow this appeal and substitute the sum of $30,000 for the sum of $15,000 as general damages.

Tan Ah Tah Ag.C.J. and **Buttrose J.** concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Rodyk & Davidson.*

YAACOB v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong F.J. and Abdul Aziz J.) September 23, 1965]

[K.L. — Federal Court Criminal Appeal No. 45 of 1965]

Criminal Law and Procedure — Trial — Confession by accused — Admissibility of — Question whether statement is free and voluntary — Question of fact for jury — Penal Code s. 302 — Criminal Procedure Code (Cap. 6) s. 224 (i) (a).

Evidence — Admissibility of — Confession — Whether statement free and voluntary — Fact for jury to decide.

The appellant had been convicted for murder under section 302 of the Penal Code. The main part of the prosecution evidence consisted of a confession alleged to have been made voluntarily by the appellant. The magistrate who recorded the confession was called and gave evidence. After that the judge listened to argument by counsel on the question of admissibility in the absence of the jury. The jury were then recalled into court, the confession was produced and admitted and it was read. Counsel for the appellant then asked to be allowed to call the accused to give evidence regarding the making of the confession but this application was refused. In his summing up the judge told the jury that he had admitted the confession because he was fully satisfied that it was made voluntarily. The jury were not told that they were entitled to their opinion of the way in which the confession had been obtained.

Held: (1) although the question of admissibility of evidence is for the judge and not the jury to decide, the question whether a statement is free and voluntary is a question of fact and must be decided on the evidence both that tendered by the prosecution and that, if any, tendered by the accused;

(2) the accused person is entitled to have the verdict of the jury on the weight and value of the confession and therefore if the confession is admitted the jury should hear the evidence so as to enable them to form their opinion on the way in which it had been obtained;

(3) in this case there had been such a disregard of the ordinary way in which criminal proceedings are conducted that the conviction could not stand.

Cases referred to:—

(1) *R.* v. *Murray* 34 Cr.App.R. 203.

(2) *R.* v. *Cowell* [1940] 2 K.B. 49.

(3) *R.* v. *Chadwick* 24 Cr.App.R. 138.

(4) *R.* v. *Francis and Murphy* 43 Cr.App.R. 174, 176.

FEDERAL COURT.

D. D. Chelliah for the appellant.

Syed Hassan (Deputy Public Prosecutor) for the respondent.

Thomson L.P.: This appellant was prosecuted for murder in contravention of section 302 of the Penal Code. He was convicted for culpable homicide not amounting to murder in contravention of section 304 and sentenced to six years' imprisonment.

Against that conviction he has now appealed.

We only find it necessary to deal with one of the grounds of appeal.

The matter arises in this way. The main part of the prosecution evidence consisted of a confession alleged to have been made voluntarily by the appellant. There was some other evidence but substantially the case for the prosecution rested on the confession and without it there was insufficient evidence to support a conviction.

It was the prosecution case that the confession was admissible because it was voluntarily made to a magistrate and this was supported by the evidence of the magistrate who recorded it.

The defence case was that it was inadmissible because the appellant had been induced to make it by tortures previously inflicted on him by two Chinese detectives, neither of whom was called as a prosecution witness. In fairness to the magistrate it should be made clear that there was no reflection of any sort on his conduct.

The magistrate was called and gave his evidence as to the events leading up to the making of the confession and he was cross-examined, all in the presence of the jury. The jury then withdrew while the judge listened to argument by counsel on the question of admissibility. He then stated:—

> "I am fully satisfied that the magistrate took every reasonable precaution to satisfy himself that the statement to be made by accused was voluntary."

That may well be true but it was not, of course, the answer to the question in issue which was whether the trial judge (and not the magistrate) was satisfied that the statement was voluntary. Nevertheless the jury were recalled into court, the confession was produced and admitted and it was read.

Counsel for the appellant then asked to be allowed to call the accused at that stage to give evidence regarding the making of the confession, basing his application on the case of *Murray*.[1] The application was refused and the case proceeded.

At the close of the case for the prosecution the appellant gave evidence on affirmation denying that he had committed the offence charged against him and explaining the confession as not being true and having been the result of tortures inflicted upon him.

In the course of his summing-up the judge dealt with the confession and told the jury he had admitted it because he was fully satisfied that it was made voluntarily. And although he did ask the jury in a rhetorical sort of way